Associated Rubber Company *and* United Steelworkers of America, AFL–CIO–CLC. Case 10–RC–15051

December 29, 2000

DECISION AND CERTIFICATION OF REPRESENTATIVE

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND HURTGEN

The National Labor Relations Board has considered objections to an election held July 23, 1999, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 53 for and 50 against with one challenged ballot against the Petitioner, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and brief, and has adopted the hearing officer's findings[1] and recommendations, and finds that a certification of representative should be issued.

The hearing officer found no merit in the Employer's objections. We agree with the hearing officer. Specifically, we agree, as does our dissenting colleague, that employee Leroy Brown was not an agent of the Union and that an evaluation of whether his conduct was objectionable must be in accordance with the standard that applies to third party conduct. Accordingly, we must determine whether Brown's acceleration of the Banbury machine's[2] cycle time was so egregious as to create an atmosphere of fear and reprisal rendering a free election impossible. *Westwood Horizons Hotel*, 270 NLRB 802 (1984). Applying this standard, the hearing officer concluded that the incident "was not of a sustained or repeated nature and a prounion employee came to the victim's rescue."

Employee Tim Spears, who did not testify at the hearing, asserted in his affidavit[3] that Union officials were handing out union literature outside the plant on July 12. As Spears walked by, they tried to give him some literature, but he refused to take any. At that point, according to Spears, employee Brown drove up in his car and told Spears that "you had better take the paper or you're going to pay for it tomorrow." Spears, who was the mill operator, asserted further that on the next day Brown ran the Banbury machine at a faster rate in retaliation for Spears refusal of the union literature the day before.

Our dissenting colleague believes that this one incident warrants a new election, inferring that the potential injury to Spears was "severe" and that word of the incident was disseminated among enough bargaining unit members to have affected the results of the election. We disagree. First, the Employer's production records do not corroborate Spears' assertion. Spears claimed that Brown told him on July 12 that he would "pay for it" the next day because he would not accept union literature. However, the record shows no acceleration of the Banbury machine on July 13, the next day. Rather, the production records for July 20, a week later than Spears asserts, indicate a shortened cycle time for a 2½-hour period that morning. Further, the record is clear that Spears sustained no injury from this incident. Nor does it contain any evidence to support the inference that Spears' risk of injury was "severe." Also, Union supporter Tony Gerald came to Spears' aid to help him deal with the accelerated production. As soon as Spears complained to management about the accelerated cycle time, the Banbury machine was slowed down to its normal cycle time and the acceleration never recurred. Contrary to our dissenting colleague, we find that the Employer had failed to show that Brown exposed Spears to such a severe degree of danger by accelerating the machine's cycle time that we can conclude that his conduct was so egregious as to render a free election impossible.

[1] The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless a clear preponderance of all the relevant evidence convinces us they are incorrect. *Stretch-Tex Co.,* 118 NLRB 1361 (1957). We have carefully examined the record and find no basis for reversing the findings.

[2] The Banbury machine is a mixer used to custom-mix rubber compounds. Once the Banbury operator has mixed the chemicals, they are dropped out of the machine in a 450-pound batch onto the mill, 8–10 feet below. The mill operator runs the batch through two rollers until the material is worked into a pliable sheet of rubber. The average cycle time for the Banbury machine is 5–6 minutes.

[3] Spears refused to testify at the hearing pursuant to the Employer's subpoena. The Hearing Officer relied on the facts contained in the Spears affidavit only to the extent they are consistent with and corroborated by the testimony of other witnesses who testified at the hearing. *See Best Western.* The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless a clear preponderance of all the relevant evidence convinces us they are incorrect. *Stretch-Tex Co.,* 118 NLRB 1361 (1957). We have carefully examined the record and find no basis for reversing the findings.

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Our dissenting colleague also finds dissemination of this incident sufficient to have affected the results of the election. We disagree. Even though the record indicates that a limited number of employees laughed about Brown "getting them if they don't vote for the union," there is no evidence that they linked Spears' experience with the Banbury machine to retaliation because he had rejected union literature a week before. We find that the Employer has failed to show that this incident involving Spears tainted the laboratory conditions necessary for a fair election. The Employer has not shown that this was more than an isolated incident, or that it involved a severe risk of injury. In addition it was quickly brought under control with the help of a prounion employee. We, therefore conclude that Brown's conduct, even considered with the two other incidents of misconduct discussed by the hearing officer did not create an atmosphere of fear and reprisal rendering a fair election impossible. Accordingly, we adopt the hearing officer's recommendation that the objection be overruled and a certification of representative issue.

IT IS CERTIFIED that a majority of the valid ballots have been cast for the United Steelworkers of America, AFL–CIO–CLC, and that it is the exclusive collective-bargaining representative of the employees in the unit found appropriate:

> All full-time and regular part-time production and maintenance employees, truckdrivers, and mechanics employed at the Employer's Plant 1, Plant 2, and Plant 3 locations in Tallapoosa, Georgia, excluding all office clericals, technical employees, lab technicians, chemists, guards, and supervisors as defined in the Act.

MEMBER HURTGEN, dissenting in part.

I join my colleagues in affirming the hearing officer's report in all but one respect. This objection relates to employee Ron Brown's acceleration of the cycle time on the Banbury machine. As the hearing officer correctly found, Brown's conduct was "more serious than a harmless prank." Further, it was in retaliation for employee Tim Spears' refusal to accept union literature. It subjected Spears to adverse working conditions and to humiliation before his peers. I would sustain this objection.

Spears refused to accept union literature. Brown informed Spears that "he needed to take what the Union handed out." Spears again refused the literature and Brown replied that "he would pay for it the next day." The next morning, Brown ran the Banbury machine at a faster than normal cycle. Spears told employee Howard that he (Spears) knew that Brown had run the Banbury machine too fast because he (Spears) would not vote for the Union.

The record shows that the shortened cycle time increased the risk of Spears' injury. Based on the weight of the compound being handled, it can be reasonably inferred that there was a potential for injury resulting from not being able to keep up with the cycle time. Moreover, word of the Banbury machine incident was disseminated among other members of the bargaining unit. Howard testified that he had heard as many as five or six employees, among them Brown, laughing at how Brown had "gotten" Spears.

In view of the fact that the election was decided by only three votes and the fact that the incident became a joke within the unit, I find that there was sufficient dissemination to affect the results of the election. As such, I find that the conduct warrants a setting aside of the election. *Westwood Horizons*, 270 NLRB 802 (1984).

My colleagues assert that there was insufficient evidence that Brown's conduct was disseminated. In this regard, they argue that employees did not know of the link between Brown's conduct and Spear's opposition to the Union. I disagree. Clearly, Spears himself was aware of the link. Further, Spears told employee Howard of the link. Finally, the five or six employees who were laughing about the incident specifically linked the incident with opposition to the Union.[1] Thus, there were at least seven employees who were aware of the link between the incident and opposition to the Union. As noted above, the election was decided by three votes.

My colleagues also contend that Brown's conduct occurred a full week after Brown's threat. However, even assuming arguendo that the incident occurred at that time, the evidence recited above establishes the link between the incident and the threat.

Finally, my colleagues assert that Spears was not injured. However, the fact that he was rescued from injury surely does not diminish the coercive character of Brown's conduct.[2]

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[1] See the testimony of employee Howard.

[2] The Employer has also excepted to the hearing officer's ruling refusing to admit portions of Spears' affidavit at the hearing. Spears refused to appear at the hearing pursuant to the Employer's subpoena. In my view, when a party requests that a Regional Director enforce a subpoena against an employee witness, the Regional Director should either enforce the subpoena or the witness's pretrial affidavit should be admitted at the hearing. In the instant case, the Employer specifically requested that the hearing officer enforce the subpoena. The request was denied. Therefore, I would reverse the hearing officer's evidentiary ruling and require that the Spears' affidavit be admitted in its entirety.